(2)

Supreme Court, U.S.
FILED

98 1742 APR 26 1999

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

RON EDWARDS, Warden,
Petitioner,

v.

MICHAEL HERRINGTON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX

Respectfully submitted,

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

STUART A. COLE *
**Counsel of Record*
CHARLES L. WILLE
Assistant Attorneys General
30 East Broad Street, 26th Fl.
Columbus, Ohio 43215-3428
(614) 728-7055
Counsel for Petitioner

6788

APPENDIX

TABLE OF CONTENTS

Page

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED 1/26/99 ..... A-1

ORDER OF THE DISTRICT COURT, DATED 12/11/97 ..... A-17

OPINION AND ORDER OF THE DISTRICT COURT, DATED 4/15/97 ..... A-21

OPINION OF THE OHIO COURT OF APPEALS, CASE NO. 7633, 3/21/83 ..... A-57

MICHAEL HERRINGTON, Petitioner - Appellant, v.
RON EDWARDS,
Warden, Respondent - Appellee.

No. 97-3542

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 1220

January 26, 1999, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. 95-00831. Smith. 4-15-97.

DISPOSITION: Decision affirmed. Judgment of the district court denying the writ of habeas corpus REVERSED and a conditional writ of habeas corpus granted.

COUNSEL: For MICHAEL HERRINGTON, Petitioner - Appellant: David Hanson, Public Defender's Office, Ohio Public Defender Commission, Columbus, OH.

For RON EDWARDS, Respondent - Appellee: Matthew J. Lampke, Thomas F. Martello, Jr., Office of the Attorney General of Ohio, Columbus, OH.

JUDGES: BEFORE: SUHRHEINRICH, CLAY, and GILMAN, Circuit Judges.

OPINION: PER CURIAM. Petitioner, Michael Herrington, appeals from the judgment denying his petition for a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. We affirm the decision finding the exclusion of evidence was not a violation of due process. But, we hold that the [*2] error in jury instructions was prejudicial. Therefore, the judgment of the district court denying the writ of habeas corpus is REVERSED and we grant a conditional writ of habeas corpus, which shall become unconditional if the State of Ohio fails to commence trial proceedings against Herrington within 180 days of this opinion.

I.

From the trial record, the Ohio Court of Appeals found the following facts: On February 27, 1981, at about 7:30 p.m., Michael Herrington and Michael Howell were drinking and at a residence in Dayton when they decided to commit a robbery. Upon leaving the house, they met Jim Terry and asked him if they could use his gun. Terry gave them his gun. Herrington and Howell proceeded to the Fireside Lounge in Dayton, Ohio.

Upon arrival, Herrington left the vehicle with the gun and robbed someone nearby while Howell remained in the car. Then, they went to another bar and had a few beers. Later, they proceeded to the Aztec Bar where they parked in the lot of the neighboring bowling alley. Meanwhile, Raymond Walton and Geraldine Rogers had pulled off the interstate

highway to use the restroom. Rogers went inside the Aztec while Walton waited outside. Howell and [*3] Walton began talking. Herrington approached with the gun and ordered them into Walton's car. Walton drove for some distance. Herrington began beating Walton with his gun and told Howell to get Walton's money. Walton lost control of the car and crashed into a tree. Neighbors came out of their houses and saw the three men struggling inside the car. Herrington fired one shot during the struggle after which Howell grabbed the gun. Both left the automobile and ran, later splitting the fifty dollars taken from Walton. Walton was taken to the hospital and died from the gunshot wound that had lacerated his heart. In June 1981, Herrington was located after being arrested in connection with a traffic violation. He admitted being in Dayton on the day of Walton's murder but denied being involved in criminal activity with Howell on that date. He also denied any knowledge of the robbery or shooting. At trial, Herrington claimed he did not remember where he was on that night. J.A. at 213-14.

On December 18, 1981, Herrington was found guilty of aggravated murder in violation of Ohio Revised Code § 2903.01(B) and aggravated robbery in violation of Ohio Revised Code § 2911.01(A)(1). J.A. at 171. [*4] At sentencing, the court "merged" the aggravated robbery with the murder charge. Essentially, the court dismissed the aggravated robbery charge. Herrington was sentenced to a term of life imprisonment. The court of appeals affirmed the common pleas court's judgment on March 21, 1983. J.A. at 213. He then applied for leave to appeal with the Ohio Supreme Court. J.A. at 224. On June 22, 1983, the Ohio Supreme Court denied Herrington's motion for lack of a substantial constitutional issue. J.A. at 271. He then filed for a writ of habeas corpus in federal district court which was rejected on April 15, 1997. J.A. at 335, 341. On December 11, 1997, the district court granted Herrington's request for a

certificate of appealability. J.A. at 355. It certified two issues for appeal. The first issue is whether the exclusion of evidence indicating that Herrington was not the "triggerman" violated his right to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The second is whether Herrington was denied his constitutional rights to trial by jury and to a fundamentally fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to [*5] the United States Constitution when the trial judge instructed the jury that it must return a verdict of either guilty on both counts listed in the indictment or not guilty on both counts.

II.

Dayton Police Sergeant James Hamby spoke with the shooting victim, Raymond Walton, in the Grandview Hospital emergency room as the victim was being prepared for surgery. The victim did not survive. According to Herrington, Hamby's testimony would have permitted a jury to infer that Howell, not Herrington, was the gunman. Herrington sought its admission on three bases: 1) as a present sense impression; 2) as an excited utterance; and 3) because the due process clause required its admission. J.A. at 219-220. According to the state court of appeals, the trial court found that "the conversation was hearsay and was too far removed from the scene of the crime in terms of time, distance, and circumstances to warrant the use of the impression exception, and the court noted further that the lapse of time and other pertinent factors, including the mental and physical condition of the decedent, precluded the admission of the conversation as an excited utterance." J.A. at 220. We agree. However, [*6] it is not the province of a federal habeas court to re-examine state court determinations on state law questions. *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991); Houston v. Dutton, 50 F.3d 381, 385*

(6th Cir. 1995). Thus, the remaining question is whether the exclusion violated Herrington's constitutional rights.

The United States Constitution provides that all criminal defendants are entitled "to have compulsory process for obtaining witnesses in their favor," *Washington v. Texas, 388 U.S. 14, 17-19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967),* and "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973).* But, the accused does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Taylor v. Illinois, 484 U.S. 400, 410, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988).*

Here, the exclusion at issue did not violate due process. As the trial court found, due process rights are sufficiently protected by the enumerated exceptions to the hearsay rule. [*7] J.A. at 220. Furthermore, the defendant does not have the right to introduce everything in his defense. His evidence as well as the state's must be reliable. In *Turpin v. Kassulke, 26 F.3d 1392 (6th Cir. 1994),* this court determined that a statement that "was of dubious exculpatory value and bore considerable indicia of unreliability" could constitutionally be excluded. *Id. at 1397.*

As previously discussed, the facts surrounding the statement to Hamby illustrate its unreliability. The statement at issue in this case is hearsay, it is not corroborated, it admittedly cannot be corroborated with other evidence, the declarant was unavailable for cross-examination, and Hamby did not ascertain several characteristics of the victim's attacker or the quality of his identification. Although its exculpatory value might seem high, it is so highly unreliable as to make its exclusion proper.

III.

A.

The judge accurately instructed the jury on the elements of both counts, J.A. at 433-34 -- aggravated murder, n1 J.A. at 437, and aggravated robbery, n2 J.A. at 436. The jury instructions also included all of the typical admonitions of impartiality, presumption of innocence, and burdens [*8] of proof. The jury retired to deliberate at 3:30 p.m.

n1 2911.01 AGGRAVATED ROBBERY

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

O.R.C. § 2911.01.

n2 2903.01 AGGRAVATED MURDER

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated

robbery or robbery, aggravated burglary or burglary, or escape.

(D) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

O.R.C. § 2903.01.

[*9]

At approximately 4:50 p.m. that same day, the jury submitted a question to the court: "Can we members of the jury vote guilty on one count and not guilty on the other count?" J.A. at 444. The court responded:

I think in many cases where there is more than one count this is impossible. In this case where the facts are so entertwined it would be impossible for you to find him guilty on one count and not guilty on the other.

J.A. at 444. Herrington's attorney, James Todd, objected that there was no requirement of consistent verdicts. He argued that the jury might find Herrington guilty of the robbery but find that he neither shot nor had anything to do with Walton's death; or perhaps it would find that the prosecution had not established that it was purposeful. J.A. at 445. The court overruled the objection. The court reasoned that "there's no way in the world, with concert of the actions of the two . . . that he could be found guilty of aggravated robbery and not guilty of aggravated murder. It may be that the jury's verdict will be not guilty on both counts I have no idea." J.A. at 445. The jury returned with a guilty verdict on both counts.

B.

The Sixth Amendment [*10] to the Constitution guarantees a defendant the opportunity to have a jury decide guilt or innocence. *Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Sullivan v. Louisiana, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); United States v. Gaudin, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995).* The court must not dictate the outcome. If it does so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause. Although here the underlying instructions are accurate and did not violate the Sixth Amendment, the answer to the jury's question was the last word on the elements heard from the court. Thus, if sufficiently prejudicial, the impact of an inaccurate instruction will not be cured by a proper underlying charge.

The trial court's answer to the jury's question was clearly error. First, both Ohio and federal law entitle a jury to find inconsistent verdicts. *United States v. Powell, 469 U.S. 57, 65, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984)*(holding that the rendering of inconsistent verdicts, even those that [*11] acquit on a predicate offense while convicting on the compound offense, will not establish insufficiency of evidence); *United States v. Miller, 161 F.3d 977, 1998 WL 801349* (6th Cir. (Mich.) 1998)("'[a] jury is free to render inconsistent verdicts or to employ relevant evidence in convicting on one count that it may seem to have rejected in acquitting on other counts.'"), *State v. Adams, 53 Ohio St. 2d 223, 374 N.E.2d 137 (1978)*("'A verdict responding to a designated count will be construed in light of the count designated, and no other.'").

Second, logic and consistency do not necessitate drawing the inferences used by the trial court and subsequent courts. The district court reasoned that the evidence established guilt,

outlining the proof of guilt -- Howell's testimony, Herrington's denial on the stand coupled with the lack of an alibi, and testimony of Howell's wife and her brother who overheard some of Herrington's comments. J.A. at 324. The district court also assumed that the jury's question indicated that the jury must have been ready to convict on one of the crimes. The court further concluded that the jury had already decided Herrington was on the [*12] scene, that it disbelieved his defense, and that if it was thinking of convicting Herrington of only one crime, it must have been aggravated murder. J.A. at 334-35. The district court based this conclusion on the fact that there was some confusion in the record as to whether Herrington took the money from the victim's person, an element of the aggravated robbery charge. J.A. at 335. This confusion, the court opined, was the most logical reason for choosing to convict on only one count even after deciding to place Herrington at the scene.

But, both the statute and the underlying instruction support the conclusion that the jury was required to find all of the elements of aggravated robbery in order to find aggravated murder. As such, if the jury did not believe an aggravated robbery had occurred, it could not find all of the elements to convict on the aggravated murder charge. Thus, it would be at least as reasonable to conclude that the jury's question indicated that it had found guilt only on the aggravated robbery count.

Finally, we must consider whether Herrington's defense made the trial court's answer proper. Herrington's only defense -- that he was not at the scene on the night [*13] of the incident -- if believed would entitle him to an acquittal on both charges. If disbelieved, Herrington put forth no further arguments relating to his innocence. Thus, the State, like the district court, argues that this required the jury, if it

disbelieved Herrington's statement, to find him guilty on both counts.

If this were a high school debating match, perhaps that would be true. However, because the State bears the burden of proving their case beyond a reasonable doubt, a defendant may be entitled to an acquittal even if his lawyer asks no questions on cross-examination and presents no case or argument of his own. Here, the jury could disbelieve Herrington's statement about his whereabouts, but still find that the State presented insufficient evidence to establish the elements of one of the counts beyond a reasonable doubt. After all, just as it could disbelieve Herrington, it could disbelieve Howell and his family members -- all persons the jury might reasonably find biased. Thus, the state and district court's explanation for the accuracy of the trial court's answer to the jury is unconvincing.

Nonetheless, the State argues that Herrington placed himself in this situation [*14] by making presence at the scene the only relevant issue for the jury to decide. Indeed, James Todd, Herrington's trial counsel, explained in his closing statement that identity was the only defense.

Remember, during opening statement I got up here and told you that we admit everything except one thing? There is one element of these offenses which myself and Michael Herrington are contesting in this case, and it is an element which the State of Ohio must prove beyond a reasonable doubt. That is identity. Was Michael Herrington there? And did Michael Herrington, with the requisite degree of what we call culpability, did he mean to participate in a robbery and murder, and did he, in fact, do so? That's it. That's all you've got to decide in this case.

J.A. at 431. Todd later made similar statements that "we admitted" the rest of the issues. J.A. at 432. But he also described the remaining issue of identity as whether Herrington "knowingly, purposefully participated in the robbery and the killing" of Walton, implicitly indicating that other elements might be in question. J.A. at 432. Furthermore, Todd spent the end of his closing argument attempting to discredit the trustworthiness [*15] and reliability of the prosecution witnesses' testimony, including that which went to elements other than Herrington's presence at the scene. State Court Trial Trans. at 357-69.

Although some of Todd's statements suggest that he admitted everything except the issue of Herrington's presence at the scene, we find that no such stipulation occurred. Neither Todd nor Herrington ever stipulated formally to the elements. Moreover, none of the parties acted as though such a stipulation was made. First, the totality of Todd's statements indicates that the defense was not merely asking the jury to determine whether Herrington was present at the crime, but rather was asking it to determine whether the prosecution had established all elements beyond a reasonable doubt. Todd's own statements explained that additional questions must be decided when he stated that proof of culpability and commission were required. Second, Todd argued that the prosecution witnesses were not trustworthy. The jury could have concurred in that assessment, in whole or in part, in a manner that might have made it possible to convict on only one of the two available counts Third, Todd objected to the judge's answer to [*16] the jury's question, again indicating that he did not believe he had stipulated to the jury deciding only the issue of presence. Finally, and perhaps most importantly, the judge himself initially instructed the jury on every element of the crimes. There is no indication in the initial jury instruction that indicates that the judge believed the

jury's purpose was to decide only whether it believed Herrington's defense.

Given that no stipulation occurred, the judge's statement was inaccurate as a matter of law. Consistent verdicts are neither legally nor logically mandated here. The jury was required to find an additional element -- purposely causing the death of another -- to convict on the aggravated murder charge. The judge himself explained this additional element in the underlying charge when he stated that a person "acts purposely when it is his specific intention to cause a certain result." J.A. at 436. It is not merely felony murder. To convict under O.R.C. § 2903.01, the jury must find either a specific intent to kill or at least find that the aggravated robbery and its manner of commission would be likely to cause death so that the intent might be inferred. *State v. Garner, [*17] 74 Ohio St. 3d 49, 656 N.E.2d 623, 634 (Ohio 1995).* Thus, proof beyond a reasonable doubt that Herrington was present during a killing that occurred during a robbery would be insufficient to sustain a guilty verdict for aggravated murder. As a result, a conclusion that the jury had made all the requisite findings to convict on both charges could not follow from a conclusion that the jury's question indicated it was ready to convict on one charge.

If the jury found all of the elements of aggravated murder, it would have been required to find all of the elements of the lesser included aggravated robbery (because an element of aggravated murder is aggravated robbery). n3 If the jury found all the elements of aggravated robbery, however, consistency would not require that it find aggravated murder. The "aggravation" in the robbery charge was the use of a deadly weapon, not the commission of a murder.

n3 Note, the jury was not instructed on lesser included offenses.

C.

The district court concluded that this [*18] error was harmless. J.A. at 320. For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures shall be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993);* accord *California v. Roy, 519 U.S. 2, 117 S. Ct. 337, 339, 136 L. Ed. 2d 266 (1996)* (per curiam); *Gravley v. Mills, 87 F.3d 779, 789 (6th Cir. 1996); Wright v. Dallman, 999 F.2d 174, 180 (6th Cir. 1993); Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993).* If the judge is sure that the error had no or very slight effect or influence, the verdict and judgment must stand. *O'Neal v. McAninch, 513 U.S. 432, 436-38, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995)*(quoting *Kotteakos v. United States, 328 U.S. 750, 764-65, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)).* However, if the judge has grave doubt as to whether a unconstitutional trial error had substantial and injurious effect or influence in determining the jury's verdict, the judge must treat the error as if it did and grant the habeas writ. Id.; accord *Gravley, 87 F.3d [*19] at 789; Houston, 50 F.3d at 386 n.1.*

To warrant habeas relief because of incorrect jury instructions, a petitioner must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire, 502 U.S. 62, 72, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991); Henderson v. Kibbe, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 97 S. Ct. 1730 (1977); Wood v. Marshall, 790 F.2d 548, 551-52 (6th Cir. 1986); Thomas v. Arn, 704 F.2d 865, 868-69 (6th Cir. 1983);* see also *United States v. Sheffey, 57 F.3d 1419, 1429-30 (6th*

Cir. 1995) (standard of review for jury instructions challenged on direct criminal appeal).

Despite this liberal standard of review, a jury instruction will not withstand scrutiny if it submits alternative theories for the jury to convict and the reviewing court cannot determine whether the jury relied on the unconstitutional instruction. *Zant v. Stephens, 462 U.S. 862, 881-83, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983); Bachellar v. Maryland, 397 U.S. 564, 571, 25 L. Ed. 2d 570, 90 S. Ct. 1312 (1970); United States v. Palazzolo, 71 F.3d 1233, 1235-38 (6th Cir. 1995); United States v. Wilkinson, [*20] 26 F.3d 623, 625 (6th Cir. 1994).* If an instruction is ambiguous and not necessarily erroneous, it can run afoul of the Constitution only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle, 502 U.S. at 72 & 73 n.4; Boyde v. California, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).*

Contrary to much of the district court's analysis, the review should not be based on the sufficiency of the evidence; but instead on the effect of the error on the jury. See *Kotteakos v. United States, 328 U.S. 750, 755, 763-65, 767, 775-76, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)*(reversal despite guilt that was overwhelmingly manifest).

In Sullivan, the Supreme Court explained that some errors are structural defects and defy harmless error review because such errors are per se harmful. *Sullivan, 508 U.S. at 281* (holding that an instruction to the jury telling it to presume certain facts was structural error). The Court stated that, "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable [*21] upon appeal; it requires an actual jury finding of guilty." *Id. at 280.* At the same time, this court does not agree that Sullivan makes all

Sixth Amendment violations structural defects and instead requires that the error in the instruction rise to the same level as removing a factual determination from the jury. See *id. at 280-81* (explaining the extraordinary gravity of the error at issue in that case). Because the facts in this case do not rise to the level of a structural error, they are not per se unconstitutional. Therefore, this court must determine whether the error was harmless before determining the disposition of the writ.

We find that this error was not harmless. We can never know what was in the minds of the jurors; but the answer to their question was error, it modified the prior instructions, and absent the instruction it might have convicted only on the robbery charge. As such, it could have had a substantial and injurious effect on the jury's independence and a substantial and injurious effect on the jury's interpretation of the initial, correct instructions. Thus, this court has grave doubt whether the instruction had substantial and injurious effect or [*22] influence in determining the jury's verdict, *O'Neal, 513 U.S. at 436,* even when viewing the judge's statements within the totality of the instructions. Thus, we are required to treat the error as if it was prejudicial and grant the writ of habeas corpus. Id.

IV.

For the forgoing reasons, this panel holds that the proffered testimony at issue was properly excluded and we AFFIRM that evidentiary ruling. However, we also hold that the answer to the jury's question made the jury instructions unconstitutionally prejudicial. Thus, we REVERSE the district court and grant a conditional writ of habeas corpus. This conditional writ shall become unconditional and permanent unless the State of Ohio commences trial

proceedings against Mr. Herrington within 180 days of this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL HERRINGTON,

Petitioner,

v.

Case No. C-2-95-831
JUDGE SMITH
Magistrate Judge Kemp

RON EDWARDS, Warden

Respondent.

ORDER

Final judgment dismissing Petitioner's habeas corpus action was entered on April 15, 1997. This matter is before the Court on Petitioner's motion for a certificate of appealability.

Petitioner was convicted on December 15, 1981 by the Montgomery County Court of Common Pleas of aggravated murder and aggravated robbery, and sentenced to prison for life. The judgment was affirmed by the Ohio Court of Appeals for the Second Appellate District on March 21, 1983, and by the Supreme Court of Ohio on June 22, 1983.

Proceeding pro se, Petitioner filed the instant action on August 25, 1995, and originally asserted three claims for relief:

1. The trial court committed prejudicial plain error when the trial judge departed from his impartiality, his duty,

and invaded the province of the jury, directed the jury verdict by impermissibly shifting the burden of proof violating Sandstrom and Franklin with an unconstitutional spillover denying petitioner due process and equal protection of the law.

2. The Trial Court abused its discretion and committed prejudicial error when the trial court denied petitioner compulsory process and confrontation in violation of the 5th, 6th, and fourteenth amendments, and confrontation clause, and due process and equal protection of the United States of America constitution clause.

3. Erroneous jury instruction misled the jury.

On November 29, 1995, the Ohio Public Defender entered an appearance on Petitioner's behalf, who filed a brief both replying to the respondent's return of writ and clarifying Petitioner's own arguments on January 26, 1996. As framed by counsel, Petitioner's claims for relief were:

Ground One: WHEN THE TRIAL JUDGE INSTRUCTED THE JURY THAT IT MUST RETURN A VERDICT OF EITHER GUILTY ON BOTH COUNTS LISTED IN THE INDICTMENT OR NOT GUILTY OF BOTH COUNTS, THE COURT DENIED PETITIONER HIS CONSTITUTIONAL

RIGHT TO A TRIAL BY JURY AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Ground Two: THE EXCLUSION OF EVIDENCE INDICATING THAT PETITIONER WAS NOT THE TRIGGERMAN VIOLATED HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On April 15, 1997, this Court issued an Opinion and Order rejecting each claim on the merits, and dismissing the action. On May 15, 1997, Petitioner filed a notice of appeal and a request for a certificate of appealability.

In order to appeal the denial of a petition for a writ of habeas corpus, the petitioner must make a substantial showing that he was denied a federal right. 28 U.S.C. §2253(c)(2); see also Barefoot v. Estelle, 463 U.S. 880 (1983); Lyons v. OAPA, et al., 105 F.3d 1063 (6th Cir. 1997). "It is generally agreed that '[this showing] requires something more than the absence of frivolity and that the standard is a higher one than the "good faith" requirement of section 1915.'" Barefoot, 463 U.S. at 893 (quoting Blackmun, Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases, 435 F.R.D. 343, 352

(1967)); see also Fed. R. App. P. 22. The Court must review petitioner's claims to determine whether they are so clearly without merit as to preclude certification of the appeal.

Upon review of the record, the Court finds that petitioner has made a substantial showing that he was denied a federal right as to both claims for relief. Accordingly, the Court certifies the following issues for appeal--

1. Whether Petitioner was denied his Constitutional rights to trial by jury and to a fundamentally fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when the trial judge instructed the jury that it must return a verdict of either guilty on both counts listed in the indictment or not guilty on both counts?

2. Whether the exclusion of evidence indicating that Petitioner was not the triggerman violated his right to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

IT IS SO ORDERED.[1]

GEORGE C. SMITH
United States District Judge

[1] To the extent that the instant case, which was filed in this Court on August 25, 1995, requires a certificate of probable cause instead of a certificate of appealability, see Lindh v. Murphy, 117 S.Ct. 2059 (1997), the Court hereby certifies that there is probable cause for the appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DITRICT OF OHIO
EASTERN DIVISION

MICHAEL HERRINGTON,

Petitioner,

v.

RON EDWARDS, Warden,

Respondent.

Case No. C-2-95-831
JUDGE SMITH
Magistrate Judge Kemp

OPINION AND ORDER

Petitioner,[1] a state prisoner, brings this action for a writ of habeas corpus under 28 U.S.C. §2254. This matter is before the Court on the petition, Respondent's return of writ, Petitioner's traverse, and the briefs and exhibits of the parties.

---

[1] The spelling of Petitioner's name varies from "Herrington," "Harrington," and "Harington," as recorded in the various documents in the case file. The defense counsel did not ask Petitioner to spell his name for the court reporter when Petitioner took the stand in his own defense; however, the reporter spelled Petitioner's name as "Harrington" throughout the trial record. Still, the petition for habeas corpus filed with this Court lists the Petitioner's name as "Herrington."

I.

Facts

On the evening of February 27, 1981, Petitioner and Michael Howell were drinking with some others at a home in Dayton, when the two decided to commit a robbery. Petitioner and Howell borrowed a gun from Howell's brother-in-law, James Terry, who was also socializing with them that evening. Terry could not remember to whom he gave the gun and did not accompany Petitioner and Howell when they left.

Petitioner and Howell, in a car that Howell had borrowed from a friend of his, went to a bar in Dayton called the Fireside Lounge. There, Howell remained in the car while Petitioner approached someone a few cars down with the borrowed gun, and proceeded to rob that person. Petitioner and Howell drove on to a second bar, where they entered and drank some beers before driving to the Talk of the Town Lounge, a.k.a. Talk Lounge or Aztec Bar.

Shortly before Petitioner and Howell reached the Talk of the Town Lounge, Raymond Walton and Geraldine Rogers pulled in so that Rogers could use the restroom. Walton and Rogers were enroute from Cincinnati to go to a different night club. While Walton was sitting in his car waiting for Rogers to return, Petitioner approached him. Petitioner eventually climbed into the front seat with Walton, and commanded Howell to get in the car as well. Howell reluctantly agreed and Walton then drove down a side street as directed by Petitioner.

While Walton was driving down the side street, Petitioner brandished the gun and demanded that Walton turn over his money. When Walton refused, he and Petitioner

began to struggle, causing Walton to lose control of his car and crash into a tree. At some point before the three men left the car, Howell took Walton's money, Walton was shot, and Howell grabbed the gun.

Neighbors responding to the noise came out and saw two white men (Petitioner and Howell) struggling with a black man (Walton). The two white men eventually ran off in different directions, while the black man (the victim Walton) approached the neighbors on the porch crying for help. Seeing that Walton was bruised and bleeding from his abdomen, the neighbors assisted him inside and attempted to stop the bleeding with a towel, while someone else from a few houses down summoned the police.

Howell, who had grabbed the gun from Petitioner after Walton was shot, threw the gun in some bushes on Riverside Drive. Eventually, he returned to the residence from which he and Petitioner had started that evening. Howell's estranged wife Sherrie and James Terry both testified that Howell was visibly upset and reluctant to talk about what had happened. Soon thereafter, Howell and Terry returned to Riverside Drive, retrieved the gun, and then returned to the home. Petitioner arrived at the home a short time later, and demanded that Howell divide with him the money that Howell had taken from Walton. Petitioner boasted to the others that he had beaten and shot Walton. (Trial Transcript, at pp. 190, 240-41.)

Officer Gary Dunsky was the first police personnel to arrive at the scene, and he immediately transported Walton to Grandview Hospital. While Walton was in the emergency room awaiting surgery, Sergeant James Hamby questioned him about what had transpired. Walton allegedly identified Howell, not Petitioner, as his assailant. The trial court

excluded Hamby's testimony as hearsay. Walton died in surgery from the gunshot wound.

Petitioner was indicted on June 9, 1981 by the Montgomery County Grand Jury for one count of aggravated robbery and one count of aggravated murder. Petitioner was arrested in Florida, previously having been arrested there on a traffic charge. Represented by court-appointed counsel, Petitioner pleaded not guilty to both charges, and proceeded to jury trial, which commenced on October 24, 1981.

At trial, Petitioner admitted to being in Dayton on the evening of February 27, 1981, but denied any involvement in the robbery or shooting of Raymond Walton. Petitioner could not remember what he was doing that night. Howell, who was not charged with any offenses, testified at trial that he and Petitioner had set out to rob someone that evening, but the Petitioner was the one who shot Raymond Walton.

During deliberations, the jury asked the trial judge whether it could find Petitioner guilty of one count but not the other. The trial judge responded "in this case where the facts are so enterwined [sic], it would be impossible for you to find him guilty on one court and not-guilty on the other." (Trial Transcript, at pp. 394-97.) On October 28, 1981, the jury found Petitioner guilty of both charges. On December 15, 1981, the trial judge set aside the aggravated robbery conviction, and sentenced Petitioner to life imprisonment for the aggravated murder.

II.

Appellate History

Represented by the same attorney, Petitioner appealed his conviction to the Court of Appeals for the Second

Appellate District. He raised the following assignments of error:

> 1. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN IMPROPERLY INVADING THE PROVINCE OF THE JURY, WHEN, IN RESPONSE TO A QUESTION PROPOSED BY THE JURY, "CAN WE MEMBERS OF THE JURY VOTE GUILTY ON ONE COUNT AND NOT GUILTY ON THE OTHER COUNT?" THE TRIAL COURT INSTRUCTED THE JURY IT WOULD BE IMPERMISSIBLE FOR THEM TO DO SO.
>
> 2. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN IMPROPERLY INVADING THE PROVINCE OF THE OF THE JURY WHEN IT INSTRUCTED THE JURY, OVER THE DEFENDANT-APPELLANT'S OBJECTION, THAT THE ALLEGED MURDER WEAPON WAS A DEADLY WEAPON AS A MATTER OF LAW.
>
> 3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN SUSTAINING THE STATE'S OBJECTION, ON HEARSAY GROUNDS, AS TO THE TESTIMONY OF A POLICE OFFICER TESTIFYING AS A DEFENSE WITNESS AS TO STATEMENTS MADE TO HIM BY THE DECEASED AT THE HOSPITAL SHORTLY AFTER HIS BEING ROBBED AND SHOT REGARDING THE IDENTITY OF THE PERPETRATORS OF THE ROBBERTY AND THE SHOOTING AND THEIR RESPECTIVE ROLES THEREIN.

4. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY, OVER THE DEFENDANT-APPELLANT'S OBJECTION, ON THE LAW OF COMPLICITY, WHEN THE DEFENDANT WAS CHARGED IN THE INDICTMENT AS A PRINCIPAL AND TRIED AS SUCH BY THE STATE.

On March 21, 1983, the Court of Appeals affirmed the judgment of the trial court.

Still represented by the same attorney, Petitioner then sought review from the Supreme Court of Ohio. In support, he raised the following propositions of law:

1. IN A CRIMINAL CASE, WHEREIN THE ACCUSED ELECTS TO EXERCISE HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE JURY IS THE SOLE TRIER OF FACTS AND ANY INTRUSION UPON THAT FUNCTION BY THE TRIAL COURT AMOUNTS TO AN IMPERMISSIBLE ABRIDGEMENT OF THAT RIGHT. THIS, IN A FELONY-MURDER PROSECUTION FOR AGGRAVATED [SIC] MURDER AND AGGRAVATED ROBBERY, IT IS PREJUDICIAL ERROR TO INSTRUCT THE JURY, IN RESPONSE TO A QUESTION POSED BY THEM, THAT THEY MUST EITHER FIND THE DEFENDANT GUILTY OF BOTH CHARGES OR NOT GUILTY OF BOTH CHARGES.

2. WHERE CONSTITUTIONAL RIGHTS DIRECTLY AFFECTING THE ASCERTAINMENT

OF GUILT ARE IMPLICATED, THE HEARSAY RULE MAY NOT BE APPLIED MECHANISTICALLY TO DEFEAT THE ENDS OF JUSTICE. THUS, THE DUE PROCESS CLAUSE REQUIRES THAT STATEMENTS MADE BY THE DECEASED TO A POLICE OFFICER AT THE HOSPITAL TO WHICH HE WAS TAKEN SHORTLY AFTER BEING ROBBED AND BEATEN CONCERNING THE IDENTITY OF THE PERPETRATORS OF THE CRIME, AS WELL AS THEIR RESPECTIVE ROLES THEREIN, WHICH STATEMENTS BEAR SUBSTANTIAL ASSURANCES OF TRUSTWORTHINESS AND DIRECTLY AFFECT THE ASCERTAINMENT OF THE ACCUSED'S GUILT, MUST BE ADMITTED INTO EVIDENCE WHEN OFFERED BY THE ACCUSED, EVEN IF SUCH STATEMENTS ARE NOT ADMISSIBLE UNDER THE ENUMERATED EXCEPTIONS TO THE HEARSAY RULE SET FORTH IN THE OHIO RULES OF EVIDENCE.

On June 22, 1983, the Supreme Court of Ohio sua sponte dismissed Petitioner's appeal as involving no substantial constitutional question.

Nearly ten years latter, on August 26, 1992, Petitioner initiated a pro se habeas corpus action in the Supreme Court of Ohio. Petitioner reiterated his argument that he suffered prejudice when the trial court instructed the jury that it could not find Petitioner guilty of one court and not guilty of the other. On October 21, 1992, the Supreme Court of Ohio dismissed Petitioner's action without opinion.

Petitioner filed the instant action for a writ of habeas corpus on August 25, 1995. He originally asserted three claims for relief:

> 1. The trial court committed prejudicial plain error when the trial judge departed from the his impartiality, his duty, and invaded the province of the jury, directed the jury verdict by impermissibly shifting the burden of proof violating Sandstrom and Franklin with an unconstitutional spillover denying petitioner due process and equal protection of the law.
>
> 2. The Trial Court abused its discretion and committed prejudicial error when the trial court denied petitioner compulsory process and confrontation in violation of the 5th, 6th, and fourteenth amendments, and confrontation clause, and due process and equal protection of the United States of America constitution clause.
>
> 3. Erroneous jury instruction misled the jury.

On September 8, 1995, Respondent, filed a return of writ arguing that Petitioner's claims are without merit.

On November 29, 1995, the Ohio Public Defender entered an appearance on Petitioner's behalf, and on January 26, 1996, filed a brief both replying to Respondent's arguments and clarifying Petitioner's own arguments. As framed by counsel, Petitioner's claims for relief are:

> Ground One: WHEN THE TRIAL JUDGE INSTRUCTED THE JURY THAT IT MUST RETURN A VERDICT OF EITHER GUILTY ON BOTH COUNTS LISTED IN THE INDICTMENT OR NOT GUILTY OF BOTH COUNTS, THE

COURT DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Ground Two: THE EXCLUSION OF EVIDENCE INDICATING THAT PETITIONER WAS NOT THE TRIGGERMAN VIOLATED HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent contends that Petitioner's claims are without merit.

III.

Petitioner's Ground One

Petitioner argues in his first claim for relief that the trial judge violated Petitioner's right to a fair trial when the judge told the jury that it must find consistent verdicts on the two counts of the indictment. The state had charged Petitioner with both aggravated robbery and aggravated murder. A little over an hour into the deliberations, the jury asked the trial judge whether it was possible to find the Petitioner guilty of one court but not guilty of the other. The judge responded:

> I think in many cases where there is more than one count this is impossible. In this case where the facts are so entertwined [sic] it would be impossible for you to find him guilty on one court and not guilty on the other.

(Trial Transcript, at p. 394.)

Ohio case law indicates, that the trial judge erred in giving such an instruction. The Supreme Court of Ohio has held that, in Ohio, "aggravated murder, as defined in R.C. 2903.01 is not an allied offense of similar import to aggravated robbery, as defined in R.C. 2911.01 . . . . Clearly, the crimes and their elements do not correspond to such a degree that commission of one offense constitutes commission of the other, nor is the commission of one merely incidental to the other." State v. Buckerstaff, 10 Ohio St. 3d 62, 66 (1984).[2] Thus, the trial judge erred as a matter of state law

---

[2] In 1981, Ohio Revised Code § 2903.01(B) defined aggravated murder as follows:

No Person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery, aggravated burglary or burglary, or escape.

In 1981, he offense of aggravated robbery was defined in Ohio Revised §2911.01 as follows:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) without the consent of the owner or person authorized to give consent;
(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

when he concluded that the two crimes were so dependent that under any facts, the commission of one necessitated commission of the other.

While it was error for the trial judge to tell the jury that it could not find inconsistent verdicts, the question before this Court is whether the error is of constitutional magnitude. Mere state law error is not sufficient for federal habeas relief.[3] To analyze the question presented by the Petitioner's asserted first ground for relief, this Court must determine if the trial court committed an error of constitutional magnitude. Furthermore, if this Court determines that the trial court made such an error, then this Court must determine if the error was harmless.

The Supreme Court of the United States recently provided new guidance on how a federal habeas court should review error by state trial courts. In Brecht v. Abrahamson, 507 U.S. 619, 634-35 (1993) the Court stated "the writ of habeas corpus has been regarded as an extraordinary relief . . . [reserved] for persons whom society has grievously wronged . . . ." The Court went on to state that habeas relief "is designed to guard against extreme malfunctions in the state judicial systems," Brecht, at 634 (quoting Jackson v. Virginia, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Some errors that may justify

---

(4) By threat.

[3]The United States Court of Appeals for the 6th Circuit recently rejected one issue presented in a federal habeas corpus petition on the ground that no federal issues were implicated. Houston v. Dutton, 50 F.3d 381, 385 (6th Cir. 1995) (citing, Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)).

reversal on direct appeal simply do not support a successful collateral attack. Brecht, at 634.

From this posture, the Court then held that the appropriate standard for determining if an error is harmless for purposes of federal habeas corpus is to ask whether the error had a "substantial and injurious effect or influence" on the jury's verdict. Brecht, at 637 (quoting, Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Thus, an error that results in a substantial and injurious effect on the verdict is a violation of the defendant's Constitutional right to a fair trial. The Brecht Court specifically held, however, that the harmless-beyond-a-reasonable-doubt standard as applied to Constitutional error in Chapman v. California, 386 U.S. 18 (1967) is too high a standard to apply in habeas corpus cases and should no longer be applied in such cases. Brecht, at 636.

Even more recently, the Supreme Court instructed federal courts on the application of the Kotteakos standard in habeas corpus cases. In O'Neal v. McAnich, 115 S.Ct. 992, 994 (1995), a case that originated in the 6th Circuit, the Court held that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." O'Neal, at 994 The Court stressed that to make such a determination, a habeas court must examine the trial record itself and ask itself if it is satisfied that the error is harmless. A habeas judge should be in "virtual equipoise as to the harmlessness of the error." Id. The Court rejected shifting the burden of proof to the petitioner to show that the trial error harmed the petitioner beyond the standard of review. Id., at 995.

The United States Court of Appeals for the 6th Circuit has had some opportunity to apply the Brecht and O'Neal holdings. In Houston v. Dutton, 50 F.3d 381, 386 (6th Cir.

1995), the Court of Appeals held Constitutionally infirm a state trial court's jury instruction to consider the use of a deadly weapon in a killing as a rebuttable presumption of malice. According to the court, such an instruction shifted the burden of proof from the state to the defendant and "essentially told the jury to reject the [defendant's] claim that the shooting was accidental. By destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant." Houston, at 386.

More recently, in a footnote in Moore v. Carlton, 74 F.3d 689, 691, n. 2 (6th Cir. 1996), the Court of Appeals clarified that the "grave doubt" language in O'Neal is not a "standard." Rather, according to the court, "[t]he term [grave doubt] . . . was used [by the O'Neal Court] to describe a situation in which a habeas court was in 'virtual equipoise' as to the trial error's harmlessness." Therefore, in the 6th Circuit, grave doubt is merely an indicator of or tool used to determine if an instruction had an injurious or substantial effect on the verdict of the jury.

If after examining the trial record, a federal habeas court has grave doubt about the effect of the instruction on the verdict, then the instruction is not harmless. On the other hand, if a habeas court is in virtual equipoise after making its review, then it can confidently find that the instruction was harmless. Equipoise is defined as "[e]qually in distribution, as of weight, relationship, or emotional forces; balance, equilibrium." The American Heritage Dictionary of the English Language (1975) at 443. Thus, in the present case, this Court must examine the trial record and then determine if the state trial court's instruction requiring consistent verdicts shifted the jury's perspective from a balanced one, equally fair to both sides, to a perspective that was unbalanced and prejudiced in favor of the state's position. If the facts of the

case, as presented by both sides at trial, indicate clearly that the jury could find only as it did, then this Court must determine that the instruction had no injurious or substantial effect.

To that end, this Court has carefully reviewed the entire trial record as well as the briefs of both the Petitioner and the Respondent. In addition, the Court has considered the effect of the instruction at issue here in light of the entire trial-- all the testimony, arguments, and instructions given to the jury. See Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Upon this review, the Court finds that the instruction at issue here did not have an injurious or substantial effect on the verdict. Given the facts of this case, a reasonable jury could find only that the Petitioner was guilty of the aggravated murder, for which the Petitioner was duly sentenced. In addition, the facts clearly support a conviction for aggravated robbery, which the trial court, in any event, set aside.

Unfortunately, the trial court did not have the advantage of clear forensic evidence to identify the culprit of the crimes at issue. Rather, the court had to rely mostly on the testimony of witnesses. At trial, the jury heard the testimony of an unindicted accomplice, Michael Howell, who was an eye-witness to most of the events of the night in question and to whom the Petitioner made statements about other events of that night. In addition, the jury heard the testimony of Howell's estranged wife [4] and her brother, both of whom heard certain of the Petitioner's statements. In contrast, the jury also heard the Petitioner's own testimony, in

---

[4] Sherrie Howell, the wife of the accomplice Michael Howell, also admitted under oath to having an affair with the Petitioner several months before the night of the crime in question. (Trial Transcript, at pp. 233-235).

which he denied his presence at the scene of the crime. In his denial, the Petitioner failed to offer any alibi as to his whereabouts on the night in question.

The accomplice, Howell, testified on direct examination as follows about the plans he and the Petitioner made to commit a robbery:

Q. All Right. Did you and the defendant have any conversation about going anywhere or doing anything?

A. Yes.

Q. I want you to tell this jury-- you realize you are under oath--tell the jury what you talked about.

A. Talked about going and robbing somebody.

Q. What did you do to do that?

A. We went out, started walking down the street, and got Jimmie's [Terry's] gun.

. . .

Q. Who actually took the gun?

. . .

A. Harrington.

. . .

Q. Where did you go after that?

A. Out to a place called Fireside Lounge.

. . .

Q. What did you go there for, you and the defendant?

A. To rob somebody. [5]

Q. What did you do there?

A. I stayed in the car. Mike [, the Petitioner,] got out.

Q. Where did he go?

A. A couple of cars down.

Q. What did he do?

A. Robbed somebody.

Q. How do you know?

A. Because he brought some money back to the car.

(Trial Transcript, at pp. 256-259).

Howell's testimony about the robbery at the Fireside Lounge and events leading up to that robbery illustrates the plans

---

[5] Under cross examination, Michael Howell continued to claim that his and the Petitioner's design for evening was to "rob somebody." (Trial Transcript, at p. 279).

made by Howell and the Petitioner and their intent to use force to accomplish their plans.

Howell then also testified about the robbing of the murder victim Ray Walton. Howell and the Petitioner drove to the Talk of the Town Lounge by way of still another bar. According to Howell, the Petitioner now had possession and control of Terry's gun. (Trial Transcript, at pp. 259-260). The following testimony taken from the trial record is relevant:

> Q. All right. What did you do when you got to the Talk Lounge?
>
> A. Mike got out of the car and I was locking it up, and when I started walking Mike was talking to a guy in another car.
>
> Q. A white man or a black man.
>
> A. A black man.
>
> Q. Who had the gun?
>
> A. Mike did.
>
> Q. What happened?
>
> A. I started to walk by and Mike said, 'get in the car, and I said, No, I ain't getting in.' He said, "Get in the car.' So I got in the car, in the back seat.

. . .

A. So I got in the car and we started going down the road and we turned on Babbitt Street, and they [the victim Walton and the Petitioner] started fighting.

Q. When you got into the car-- when you got into the car, did the defendant have the gun?

A. Yes. He had it down by his side.

Q. Could the driver see the gun?

A. I don't think so.

Q. All right. What did he say to the driver? Anything?

A. Yeah. He told him to take off, and when we turned on Babbitt Street, he said, 'Give me your money,' and the guy wouldn't do it, and they started fighting, and we hit a tree.

. . .

A. So when we hit a tree I flew up and hit my head on the seat, and they was still fighting, and they both came over the back seat and was on top of me, fighting, and Mike [the Petitioner] said, 'Get the money,' and I wouldn't do it, and he said, 'get the money' so I went ahead and got the money, and Mike was beating the guy with his hand. (Trial Transcript, at pp. 260-262).

Sherrie Howell testified under both direct examination and cross examination that she saw marks on Michael Howell's

head. (Trial Transcript, at pp. 239, 245). Such marks are consistent with his story that he received those marks from hitting the back of the front car seat upon the car's collision with the tree.

According to Michael Howell, as the fight inside the car progressed the Petitioner said to the victim "I'm going to blow you away, n-----." (Trial Transcript, at p. 262). Shortly, the prosecutor asked Michael Howell "Who shot the black man?" Howell answered with the following testimony:

A. Mike Harrington.

Q. Were you there?

A. Yes, I was.

Q. Did you see him do it?

A. Yes.

Q. How many shots?

A. One.

Q. Were the doors on the car open or closed?

. . .

A. Closed.

Q. Windows down or up?

A. Up.

Q. Who grabbed the money . . . from the deceased's pocket?

A. I got the money out of his pocket. (Trial Transcript, at pp. 263-264).

Howell's testimony indicating a single shot and a closed up car, concealing the sound of the shot from neighbors, is consistent with forensic evidence and police testimony. (Trial Transcript, at pp. 167-181).

Howell ran from the scene back to the borrowed car he had been driving. There, he encountered Geraldine Rogers and another black man who apparently was attempting to help Rogers find Walton. Again, Howell's testimony is consistent with statements of another witness-- this time Rogers' testimony. (Trial Transcript, at p. 144).

Howell's borrowed car ran out of gas, so Howell returned to the house on foot. Along the way he discarded the gun, which he said he had taken from the Petitioner after the shooting. When the prosecutor asked Howell why he threw the gun away, Howell testified that he had been "[s]cared as hell." (Trial Transcript, at p. 268). Nevertheless, he and Terry later returned to the spot where Howell had thrown the gun so that they could retrieve it.

Still later, back at the house, the Petitioner also reappeared. According to Howell, the petitioner demanded that Howell divide with him the money Howell removed from Walton's pocket. (Trial Transcript, at p. 270). The following statements comprise Howell's testimony about the events back at the house:

Q. What did the defendant say when he came over?

A. He said, 'give me some money,' so I gave him the money and him and Jimmie [Terry] started to get into an argument over the gun.[6]

Q. Did he say anything about what had happened?

A. Yes, but he said-- the more he talked-- he didn't say nothing at first but the more he talked, he kept on saying, 'I blew the n------'s balls off.' He told Jimmie that. (Trial Transcript, at p. 271).

On cross examination, Michael Howell restated that the Petitioner had possession and control of the gun while the two of them were at the Fireside Lounge and at the Talk of the Town Lounge. The following testimony comes from the trial record:

Q. Now, when this incident at the Fireside Lounge occurred, did Michael Harrington keep the gun?

A. Yes. He still had the gun.

Q. Well, didn't you want it back?

A. No.

Q. Well, it was originally given to you, wasn't it?

A. No.

---

[6] The gun was now missing a part that came loose when the gun was fired.

Q. So you were going to let him return it to your brother-in-law?

A. Yes, at first

. . .

A. Yeah. After he shot the guy and I grabbed the gun, I was going to give it to Jimmie and tell him what happened. (Trial Transcript, at 281-282).

Upon closing his cross examination, the defense counsel asked Michael Howell if he was the one who had shot Walton. Howell denied shooting Walton, but he did admit taking "some money" from the victim. The following testimony comes from the trial record:

Q. You shot that guy, didn't you.

A. No, I did not.

Q. The gun wasn't in your hand when you pulled that trigger?

A. No. It was not. (Trial Transcript, at 300).

Sherrie Howell testified about what she had heard when her husband and the Petitioner finally returned to the house. The following testimony comes from the trial record:

Q. Mrs. Howell, tell this jury in your own words what Michael Harrington, the defendant, told you happened that evening.

A. They they [sic] had robbed a man and he said he shot the n-----'s f------ balls off.

Q. Who said that?

A. Michael Harrington. (Trial Transcript, at p. 240).

About the splitting of the money, Sherrie Howell said that the Petitioner had stated "that he had money to out with the next night and that the person he got it from didn't." The prosecutor asked "Did he say 'that person'?" to which Sherrie Howell replied "[h]e said, 'that n-----.'" (Trial Transcript, at p. 241).

James Terry, Michael Howell's bother-in-law, who had given Howell and the Petitioner the gun that night also testified as to what he saw and heard when Howell and the Petitioner returned to the house. His testimony is as follows:

Q. Okay. How did [the Petitioner] appear?

A. He was out of breath, tired. He was sweating and his clothes--he had been running. He said he was running.

Q. He said he was running.

A. Uh-huh.

Q. What about his hands or his knuckles?

A. His hands were swollen. His knuckles were scratched up.

Q. All right. Did he tell you what happened, how that happened?

A. He said he beat this n-----.

Q. Is that what the defendant told you?

A. Uh-huh.

Q. What?

A. Yes.

Q. What else did he tell you?

A. He told me that every time he hit this guy he would scream like a bitch, so he hit him again.

Q. Did he tell you anything about a gun?

A. Yes. He told me he fired a shot into the seat between his legs but he said he didn't think he hit him, and Michael Howell said he didn't think he hit him either.

Q. Then, what?

A. Well, there was a lot of confusion, about different talk, stories, then later on in the evening Michael Harrington said--

Q. The defendant?

A. He said that he thinks he blew the n------'s f---- -- balls off.

Q. Are those the words the defendant used?

A. Yes. (Trial Transcript, at pp. 190-192).

The Petitioner took the stand in his own defense. Under direct examination, the defense counsel inquired about his client's whereabouts on the night of the murder. The Petitioner's testimony on that subject follows:

Q. Now, I ask you whether or not you were present with one Michael Howell on the evening of February 27, 1981, in the area of the Talk Lounge and participated in the robbing and shooting of a black man?

A. No, I didn't. (Trial Transcript, at p. 330). Defense counsel then asked the petitioner to state where he was that night?

Q. Okay. Do you know where you were on the evening of February 27, 1981?

A. I been thinking since this whole trial. I honestly can't recall where I was on that specific night or day.

Q. Do you know if you were in Florida or if you were up here at the time?

A. I was here in Dayton. (Trial Transcript, at pp. 330-331).

Further, the Petitioner denied making a statement to anyone, including Michael Howell, Sherrie Howell, or James Terry, that he "blew some n-----'s balls off." He also denied having any ill will, hatred, or malice toward "black people."

(Trial Transcript, at p. 332). Finally, the Petitioner also claimed that at the time of murder he owned his own gun, of a caliber different from that of the murder weapon. (Trial Transcript, at pp. 331, 339).

Under cross examination, the Petitioner continued to deny being present at the murder scene:

> Q. On February 27, 1981, is it your statement or story here today that you have no idea where you were that day or night?
>
> A. Yes, it is.
>
> Q. You have no idea who you were with of anything else?
>
> A. No.
>
> Q. No what?
>
> A. Yes, that's my statement. No. I don't know exactly where I was. (Trial Transcript, at pp. 341-342).

Clearly, the jury's verdict turned on the credibility of the witnesses. Since, the jury, upon its initial deliberations, apparently was ready to convict the Petitioner of at least one of the crimes, it obviously placed the Petitioner at the scene. The jury could not have believed the Petitioner when he said he was not involved, if it was willing to convict on at least one of the crimes. Conversely, the jury must have believed the accomplice and the other corroborating witnesses on the issue of Petitioner's presence and involvement in the crime.

Nevertheless, the jury was confused about the charges against the Petitioner. Certain testimony led the jury to at least ponder whether the Petitioner was guilty only of one crime. Which crime? From the testimony quoted above, it appears that the jury believed that Petitioner was not guilty of robbery since he did not take the victim's money directly from the victim's person. As long as the jury believed the accomplice Howell's statements that Petitioner retained control over the gun during the robbery of Walton, only Petitioner could have shot and killed Walton. Until the trial judge instructed otherwise, the jury, in this Court's opinion, was ready to convict on the murder charge but not on the robbery charge.

In this regard, the errant instruction did not shift the burden of proof from the state to the defendant as the instruction did in Houston. The judge's instruction to find consistent verdicts did not destroy the defendant's case, since that case turned principally on lack of identity. Rather, the jury had already decided that Petitioner had been involved in the events of that night. Thus, the instruction did not have a substantial or injurious effect on the verdict, and, therefore, the instruction did not result in an error of constitutional magnitude.

The Petitioner argues "[w]ell established principles of recency and specificity set the [instruction at issue] apart from the body of the general instruction." (Petitioner's Brief, at p. 5.) Yet, the Petitioner does not cite any authority for these so-called well established principles and the Court is not persuaded that the jury was incapable of considering all the instructions provided by the court. Rather, the Court believes that the jury's verdict reflects a balanced view of the facts of this case.

Petitioner also points to a newspaper article in which the jury forewoman stated her belief that the instruction of the trial judge affected the verdict. (Petitioner's Brief, at Appendix A-1.) Nevertheless, when this Court considers this post hoc statement of only one juror in light of all the evidence presented at trial and the totality of the instructions given to the jury, the Court is still unconvinced that the erroneous instruction had a "substantial and injurious affect on the verdict."

In sum, after conducting its own careful review of the entire trial record, this Court is not in "grave doubt" about the effect the jury instruction at issue here had on the verdict. Further, this conclusion is consistent with the Supreme Court's instructions in Brecht that "granting habeas relief merely because there is a 'reasonable possibility' that the error contributed to the verdict is at odds with the historic meaning of habeas corpus . . . ." Brecht, at 637 (citations omitted). The Petitioner received a fair trial, and the facts as presented here support the verdict.

IV.

Petitioner's Ground Two

Petitioner asserts a second ground for relief. Petitioner claims that the refusal of the trial court to admit the hearsay testimony of Sergeant James Hamby concerning the latter's questioning of the victim at the hospital violated Petitioner's right to due process.

Under the Sixth Amendment to the Constitution of the United States, all criminal defendants are entitled "to have compulsory process for obtaining witnesses in [their] favor." U.S. Const. amend. VI. The Supreme Court of the United States held in Washington v. Texas, 388 U.S. 14, 17-19

(1967), that this important Sixth Amendment right applies also to the states by virtue of incorporation in the Due Process Clause of the Fourteenth Amendment. Thus, the state law on hearsay even in state trials must conform to the mandates of the federal Constitution.

The trial court and state court of appeals properly held that as a matter of state law the proffered evidence was hearsay and that it did not fit into any of the exceptions for admission of hearsay.[7] Regardless of compliance with state

---

[7] The victim's statement to Hamby clearly is hearsay as defined in Ohio Rules of Evidence ("ORE") 801(C). Per ORE 802 hearsay is not admissible unless otherwise provided by Constitutional or statutory law or other evidentiary rules. The testimony that the trial judge excluded does not qualify as a dying declaration of the victim/declarant, since the victim/declarant did not know that he was about to die at the time he made the statements to the Hamby. Hamby's testimony, therefore, does not satisfy the exceptions to the hearsay rule laid out in ORE 804.

Petitioner's counsel at trial attempted to invoke the hearsay rule exceptions under ORE 803, specifically claiming that the statements made to Hamby by the victim/declarant were either "excited utterances" or "present sense impressions." The trial judge ruled that the statements were made too long after the incident to satisfy either exception. In such evidentiary matters, a trial court has broad discretion. Unless that discretion is abused, a reviewing court generally should uphold the trial court's decision. State v. Hymore, 9 Ohio St. 2d 122, 128 (1967).

Unlike the Federal Rules of Evidence, the Ohio Rules of Evidence did not at the time of the Petitioner's trial and still

law, however, that rule of law must conform to the Petitioner's constitutional rights. The question for this Court, then, is to determine if exclusion of the Hamby testimony, even though properly ruled inadmissible under the state's evidence rules, denied Petitioner his right to compulsory process.

Petitioner rightly asserts the rule of Chambers v. Mississippi, 410 U.S. 284, 302 (1973), which holds that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." See Petitioner's Brief, at p. 10. In Chambers, the petitioner had been convicted for murder after failing at trial to admit the testimony of a three persons to whom another person had confessed to committing the crime. The declarant later repudiated the confessions in a written statement. The Supreme Court of the Untied States held that, under the facts of that case, the trial court erred in excluding the hearsay statements. These statements were critical to the defendant's case, bore substantial assurances of trustworthiness, and were corroborated by other evidence in the case. In addition, the statements were definitely against the declarant's interest, and the declarant was available for cross examination. Under such conditions, the Court held that the hearsay statements should

---

do not contain a general residuary exception to the hearsay rule to apply in the extreme circumstances.

The United States Court of Appeals for the 6th Circuit has stated that "[i]n considering a petition for a writ of habeas corpus, 'the federal courts must defer to a state court's interpretation of its own rules of evidence and procedure.'" Allen v. Morris, 845 F.2d 610, 614 (6th Cir. 1988) (quoting, Machin v. Wainwright, 758 F.2d 1431, 1433 (11th Cir. 1985)).

have been admitted in order to comport to the petitioner's due process rights. Chambers, at 298-303.

The instant case does not resemble Chambers. Here, the statement of the victim to Hamby definitely does not fit within any exception to the state hearsay rule and apparently could not be corroborated by other evidence. Also, more importantly, the declarant in this case was unavailable for cross examination. While the testimony about the victim's statement was to come from a police officer, who could be a reliable witness, the general reliability of the original statement is impossible to determine. Specifically, there are unanswered questions about the victim's cross-racial identification of his assailant, such as lighting, skin markings, clothing, or voice patterns that Hamby did not have time to ascertain. Thus, regardless of Officer Hamby's willingness to testify faithfully as to what the victim told him, the reliability of the statement is questionable, which is why the statement does not fit into one of the grounded exceptions to the hearsay rule.

Nevertheless, without offering any persuasion, Petitioner urges this Court to "extend Chambers to the instant case." Petitioner's Brief, at p. 10. The Court is unwilling to do so. Even the Chambers Court instructed that the right to present relevant testimony is not unlimited and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers, at 295. See also Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

Furthermore, in a recent decision, the United States Court of Appeals for the 6th Circuit distinguished the facts and result in Chambers from the case under consideration by that

court. In Turpin v. Kassulke, 26 F.3d 1392, 1395 (1994), the Court of Appeals applied the Chambers "factors" in upholding a state trial court's exclusion of hearsay testimony. Weighing these factors, the Turpin Court said that the facts there "differ[ed] materially from those set forth in Chambers in that the excluded statement "was of dubious exculpatory value and bore considerable indicia of unreliability." Turpin, at 1397. In the present case, while the Hamby testimony purportedly would have been exculpatory, it is, as discussed just above, generally unreliable.

The majority in Turpin also explained its deference to state courts as to admission of evidence in habeas corpus cases. In such regard, the court stated:

> The dissent undoubtedly feels that the trial judge would have been wiser simply to let a jury determine the exculpatory value and reliability of [the declarant's] statement. On that point the dissent may be right, and that fact might have been sufficient to carry the day if in this case we were exercising our supervisory powers over a federal court. But we exercise a more limited power here. Turpin was convicted in Kentucky state court, so the issue before us is not whether it would have been wiser to have granted Turpin's . . . motion, but whether the trial judge's failure to do so violated the minimal requirements of the Fourteenth Amendment's Due Process Clause. That clause does not compel the admission of evidence that is unreliable and of questionable exculpatory value. Turpin, at 1398.

In the present case, the trial judge was within his discretion to exclude unreliable evidence in the

interest of preserving the integrity of the criminal trial process. The Petitioner has not shown that his Due Process rights were violated by that decision in light of the standards provided by the Supreme Court in Chambers. See also Davis v. Jabe, 824 F.2d 483, 486-488 (6th Cir. 1987) (also factually distinguished from Chambers).

Petitioner claims that the proffered Hamby testimony "did bear the indicia of reliability." Petitioner's Brief, at p. 10. As stated above, this Court does not believe that the evidence was reliable. Nevertheless, the Court will reexamine the reliability of the evidence in light of other instruction.

In Rock v. Arkansas, 483 U.S. 44, 53-56 (1987), the Supreme Court of the United States held that a per se evidentiary rule, in that case a rule barring all hypnotically refreshed testimony, does not comport with due process. Therefore, evidentiary rulings must be flexible, and exclusion of evidence must not be "arbitrary or disproportionate to the purposes they are designed to serve." Id., at 56.

Here, exclusion of the evidence by the trial judge and the state court of appeals came only after carefully examining all the pertinent state rules. The trial judge applied the state rules in a manner fair to both sides.[8] The decision was not made out of inflexibility or arbitrariness.

---

[8] Even the Supreme Court of the United States, when it held that the Compulsory Process Clause applied to the states, also stated that "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the

Taking its instruction from the Supreme Court of the United States, the United States Court of Appeals for the Sixth Circuit also has provided guidance on how to judge the reliability of hearsay testimony. In Fuson v. Jago, 773 F.2d 55, 59 (6th Cir. 1985) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)), the Court of Appeals stated that if hearsay testimony falls within an established hearsay exception, its reliability can be inferred, but if such testimony does not fall within an exception, then the testimony must be excluded unless the proponent can show that the testimony bears "particularized guarantees of trust worthiness [sic]."

These guarantees or "indicia of trustworthiness," according to the Court of Appeals in U.S. v. Gomez-Lemos, 939 F.2d 326, 332 (6th Cir. 1991) (quoting, Idaho v. Wright, 497 U.S. 805, 815 (1990)), depend upon the "circumstances 'that surround the making of the (hearsay) statement and render the declarant particularly worthy of belief.'"[9] Thus, in this Circuit, reliability of hearsay is judged by circumspection of all the factors relevant to where, how, and when the declarant made the statement.

When this Court considers the unreliable circumstances of the victim's statement to Hamby, it is still convinced that the trial judge properly excluded the testimony. There are simply too many unknown elements about how Hamby secured the statement.

---

ascertainment of guilt and innocence." Washington v. Texas, 388 U.S. 14, 23, n.21 (1967).

[9] The Wright Court actually used the term "totality of circumstances." 497 U.S. at 820 (emphasis added).

Furthermore, the defense counsel did not offer any specific reasons to admit the testimony outside the hearsay exceptions in the state rules of evidence. The decision of Ohio v. Roberts, with its prescription for particularized guarantees of trustworthiness should have been known to the trial court and both counsel. Yet, the defense counsel offered no such guarantees. It was, thus, proper and constitutional for the trial court to exclude the Hamby testimony.

V.

Disposition

For the foregoing reasons, the Court finds that the Petitioner's claimed grounds for relief are not meritorious and therefore are not sustained. Accordingly, the Writ of Habeas Corpus is DENIED, and this action is DISMISSED.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

_____

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

AO 50 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

MICHAEL HERRINGTON,

Petitioner,

vs.

RON EDWARDS, Warden,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. C2-95-831

Judge Smith
Magistrate Judge Kemp

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order filed April 15, 1997, the Writ of Habeas Corpus is DENIED, and this action is hereby DISMISSED.

Date: April 15, 1997 KENNETH J. MURPHY,
CLERK
s/ Georgeanna Willman
By /Deputy Clerk

STATE OF OHIO, Plaintiff-Appellee, vs. MICHAEL A. HARRINGTON, Defendant-Appellant

No. 7633

COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO

1983 Ohio App. LEXIS 12081

March 21, 1983

COUNSEL: [*1]

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio BY: Patrick K. Adkinson, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, P.O. Box 972, 451 West Third Street, Dayton, Ohio 45422, Attorney for Plaintiff-Appellee

JAMES L. TODD, Attorney at Law, 29 East First Street, Dayton, Ohio 45402, Attorney for Defendant-Appellant

JUDGES: WILSON, J., and WEBER, J., concur.

OPINION BY: KERNS, J.

OPINION: OPINION

The defendant, Michael A. Harrington, was tried by jury in the Court of Common Pleas of Montgomery County and found guilty of aggravated murder in violation of Section 2903.01(B), Revised Code, and of aggravated robbery in violation of Section 2911.01(A) (1), Revised Code. Thereafter, the trial court sustained a motion of the defendant

to set aside and vacate the aggravated robbery conviction, but on December 18, 1981, Harrington was sentenced to life imprisonment in the Ohio State Penitentiary for aggravated murder. From the judgment and sentence so entered, an appeal has been perfected to this court.

On February 27, 1981, at about 7:30 P.M., Michael Harrington and Michael Howell, along with several other persons, were **[*2]** drinking and playing ping-pong at a residence on Bond Street in Dayton, Ohio when they decided to commit a robbery. Upon leaving the house, they encountered one Jim Terry. They told Terry that they were going to a bar and asked him to use his gun in case of trouble. Then, after receiving a loaded weapon from Terry, Harrington and Howell proceeded to the Fireside Lounge on Salem Avenue.

Upon arrival at the parking lot of the Fireside Lounge, Harrington left the vehicle with the gun and robbed someone nearby while Howell remained in the car. The two individuals then proceeded to another bar and drank a few beers before proceeding to the Aztec Bar on North Main Street where they parked on the parking area of a bowling alley which was located next door to the Aztec Bar.

At about the same time, Raymond Walton and Geraldine Rogers pulled off of the interstate highway to enable Rogers to locate a restroom, and upon stopping at the Aztec Bar, Walton waited outside while Rogers was inside the bar.

At this point, Howell noticed Harrington with the gun as he was talking to Walton, and the defendant told Howell to get into the car whereupon Walton drove for some distance before he and Harrington **[*3]** began to fight. While Harrington was beating Walton with the gun, he instructed Howell to get his money, and amidst the confusion, Walton

lost control of his car causing it to crash into a tree at the intersection of Babbitt and McDaniel Streets. The noise from the crash drew the attention of several neighbors who witnessed the three males as they struggled inside the car. During the struggle, according to the evidence, the defendant fired one shot, after which Howell grabbed the gun. Both then left the automobile and ran. Later, Harrington and Howell divided the fifty dollars which had been taken from Walton.

Subsequently, Officer Gary Dunsky received a dispatch about the incident, and upon locating Walton, he removed him to Grandview Hospital where Walton died from a gunshot wound which lacerated his heart.

Thereafter, in June, 1981, Harrington was located in Miami, Florida after being arrested in connection with a traffic charge. He admitted that he had been in Dayton on February 27, 1981, but he denied that he was involved in any criminal activity with Howell on that date. He further denied any knowledge of the robbery and shooting on February 27, 1981. In fact, **[*4]** Harrington claimed at the trial that he didn't remember where he was on the evening of the crime alleged against him.

In the appeal, the first assignment of error is directed to an instruction given by the trial court to the jury in response to a question asked by the jury during their deliberations. Specifically, the trial court received the inquiry, "can we members of the jury vote guilty on one count and not guilty on the other count", and in answer to this question, the court stated that "in this case where the facts are so intertwined, it would be impossible for you to find him guilty on one count and no-guilty on the other". At that point, an objection was interposed on the alleged ground that the court was forcing the jury to return consistent verdicts, but the objection was overruled, with the trial court noting that the facts were

undisputed that the shooting took place at the same time as the robbery.

In advising the jury that the defendant was guilty or not-guilty of neither or both of the alleged offenses, the trial court apparently relied upon the fact that Harrington's sole defense to either of the charges revolved entirely around that of identity. In other [*5] words, the court concluded that if the jury believed the defendant, they would have to acquit him of both charges, whereas if they disbelieved his defense, they would have to convict him of both charges. In view of the evidence presented in this case, there is some logic to the reasoning of the Common Pleas Court, but ordinarily, the charges set forth in the indictment constitute separate and distinct matters and should be considered separately for all purposes. In other words, the jury should have been advised to apply the evidence separately to each of the two counts, but we are not convinced that the failure of the court to separate the robbery from the murder under the undisputed evidence relied upon herein had any material effect upon the outcome of the case.

Here, the trial court informed the jury of the elements of both aggravated murder and aggravated robbery and that the State was required to prove all of the elements of each offense beyond a reasonable doubt. Hence, the answer to the question proposed by the jury required proof of all elements of both offenses before the jury could return the verdict of guilty to aggravated murder, and surely, the appellant [*6] does not seriously contend in this case the jury altered its course to find Harrington guilty of aggravated murder in addition to its finding of guilty to aggravated robbery in order to be wholly responsive to the trial court's request for consistency.

In determining the question of prejudicial error in instructions, the charge must be considered as a whole, and it must be reviewed in relation to and as it affects and is affected by the remaining portions of the charge. See, *State v. Hardy, 28 Ohio St. 2d 89; State v. Porter, 14 Ohio St. 2d 10.*

In support of the first assignment of error, the defendant also relies to some extent upon *People v. Martin, 398 Mich. 303, 247 N.W. 2d 303.* In that case, the defendant was charged with the offenses of possessing and selling heroin, and the trial court instructed the jury, without objection, that the evidence necessitated a finding of guilty of both offenses or not-guilty of both offenses. The jury returned a verdict of guilty of both offenses, but upon appeal, the Supreme Court of Michigan held that the instruction of the trial court was erroneous, and proceeded to set aside the conviction for the more serious offense. The **[*7]** opinion in the Martin case does not indicate whether the defendant therein relied upon the defense of identity, but in any event, that case does bear some distinguishable features. There, the requirement of consistency conceivably could have misled the jury because of the affinity of the two crimes, but here, it is inconceivable that the verdict of guilty to aggravated murder was solely traceable to the instruction, and at this juncture, the appellant can claim no prejudice from the conviction of aggravated robbery. The first assignment of error is overruled.

The second assignment of error has been set forth by the appellant as follows:

"2. The trial court committed prejudicial error in improperly invading the province of the jury when it instructed the jury, over the defendant-appellant's objection, that the alleged murder weapon was a deadly weapon as a matter of law."

In instructing the jury on the elements of aggravated robbery, the trial court commented that "the court will charge you as a matter of law, the revolver is in fact such a deadly weapon, if it was in fact used by the defendant". The defense interposed an objection to the instruction, but the objection was overruled, **[*8]** with the trial court correctly noting that the defendant had admitted that the weapon was a deadly weapon in his opening statement and in his closing argument.

Although the admissions of the appellant during opening statement and closing argument would substantially minimize any effect of the subsequent instruction, neither the statements or arguments of counsel were evidence upon which the jury could base a finding of guilt or innocence. However, this alleged error must be overruled for a more cogent reason. As heretofore indicated, the conviction for aggravated robbery was vacated and set aside. Hence, the appellant can claim no prejudice from any instruction which dealt exclusively with that crime. The second assignment of error is overruled.

The third assignment of error has been stated as follows:

"3. The trial court committed prejudicial error in sustaining the State's objection, on hearsay grounds, as to the testimony of a police officer testifying as a defense witness as to statements made to him by the deceased at the hospital shortly after his being robbed and shot regarding the identity of the perpetrators of the robbery and shooting and their respective roles **[*9]** therein."

At the trial, the defendant called, as his first witness, James Hamby of the Dayton Police Department. Sergeant Hamby testified that he arrived at the intersection of West Babbitt and McDaniel Streets during the evening hours of February 27, 1981, and that as a result of conversations with another

officer, he proceeded to Grandview Hospital, where he spoke to the victim, Raymond Walton, who was laying on a stretcher in the emergency room with doctors and nurses administering to him.

Upon inquiry as to the nature of the conversation between Hamby and Walton, the State objected on the ground that any statements made by the decedent at that time were inadmissible hearsay. To the contrary, the defense argued that the statements were admissible under the "present sense impression" and "excited utterance" exceptions to the hearsay rule. Evid R. 803(1)(2). The defense also suggested that the due process clause required the admission of the statements.

In sustaining the objection of the State, the trial court observed that the conversation was too far removed from the scene of the crime in terms of time, distance, and circumstances to warrant the use of the impression **[*10]** exception, and the court noted further that the lapse of time and other pertinent factors, including the mental and physical condition of the decedent, precluded the admission of the conversation as an excited utterance. Finally, the court reasoned that due process rights were sufficiently protected by the exceptions to the hearsay rule. After the statements of the decedent were declared inadmissible, the defense proffered testimony through Sergeant Hamby as to his conversation with Walton, and from this testimony, a jury could have inferred that Walton was actually shot by Howell during the struggle in the car.

Under any view of the evidence, the statements alleged to have been made by Walton to Hamby were offered in evidence at the trial to prove that Howell rather than Harrington was the triggerman at the scene of the crimes. Hence, the statements constituted "hearsay", as that term is defined in Evid. R. 801(C), and noticeably, the statements do

not fall within any of the five hearsay exceptions which may be applied where a declarant is unavailable as a witness (Evid. R. 804(B). Under existing law, therefore, the defendant was relegated to Evid. R. 803 in seeking admission **[*11]** of the statements, and under the facts and circumstances shown by the evidence, the determination of whether the statements were present sense impressions or excited utterances necessarily invoked the discretionary authority of the Common Pleas Court.

Ordinarily, the trial court has broad discretion in the admission and exclusion of evidence, and unless it clearly has abused that discretion and a defendant has been materially prejudiced thereby, this court may not interfere. *State v. Hymore, 9 Ohio St. 2d 122; State v. Nabozny, 52 Ohio St. 2d 195.* More specifically, the record must disclose an abuse of discretion, as that term is defined in law. *State v. Adams, 62 Ohio St. 2d 151.* In the present case, the record shows that the issue as to the admissibility of the decedent's statements was ably argued by counsel and carefully considered by the court outside the presence of the jury, and in our opinion, the trial court did not abuse its discretion in sustaining the State's objection to the hearsay statements. The third assignment of error is overruled.

The fourth assignment of error, as urged by the appellant, is as follows:

"4. The trial court committed prejudicial error **[*12]** in instructing the jury over the defendant-appellant's objection, on the law of complicity, when the defendant was charged in the indictment as a principal and tried as such by the State."

In support of this alleged error, the appellant argues that he was charged and tried as a principal for the aggravated murder and aggravated robbery, and that it was error,

therefore, to charge the jury on the elements of complicity. However, this argument encounters opposition from Section 2923.03(F), Revised Code, which provides as follows:

"Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

With reference to the applicable statute, this court has commented as follows:

"The statute does not require the state to elect or to otherwise indicate whether it was seaking or the evidence would disclose the accused acted as principal or as aider and abettor. The purpose of R.C. 2923.03 is expressly designed to eliminate this technicality and we have not been referred to any case **[*13]** to the contrary. See State v. Childs, October 19, 1979, No. 6261, unreported, Court of Appeals of Montgomery County. * * * * While it is unnecessary, it may be added that the method, circumstances, and way in which a crime was executed is a matter of evidence. The nature and identity of the offense is not involved, eliminating any issue of notice in the traditional sense of due process. Whether one or all of the participants were principals in an undertaking or merely assisted each other in some form of aiding or abetting is immaterial so long as each in his individual capacity had the required culpability and committed the elements of the criminal act prohibited by law. We are not concerned in this case with statutory criminal conspiracy. Here the actors were present during the commission of the offense and while one may have done one act and the second another, each was under the circumstances acting according to a single, unlawful purpose or design. This is typical of an aider and abettor situation, a cooperative and unlawful undertaking committed

by two or more persons acting in the common enterprise." State v. Burggraf, Montgomery County Court of Appeals (1981), **[*14]** Case No. 6960. See also, State vs. Myles, Montgomery County Court of Appeals (1980), Case No. 6507.

As we understand it, the complicity statute makes no allowance for construction, and the fourth assignment of error is overruled.

After a cumulative analysis of all of the alleged errors, and in consideration of the evidence, we are of the opinion that the defendant was afforded a fair trial, and the judgment of the Court of Common Pleas will be affirmed.